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Albertson v. School Board of Fenway: Is Racial Imbalance in Public Schools Unconstitutional--Yes

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Comments

ALBERTSON V. SCHOOL BOARD OF FENWAY: IS RACIAL IMBALANCE IN PUBLIC SCHOOLS UNCONSTITUTIONAL?—YES*

INTRODUCTION

In the years since *Brown v. Board of Education* most school districts in this country have abandoned the traditional segregated school system. Today what is called "de facto" segregation or "racial imbalance" is the prevailing situation in most areas with large Negro populations. This results from a variety of factors, primarily housing patterns and the use of the neighborhood school plan.

The basic issue is not whether racially imbalanced public schools are unconstitutional in every case. Obviously, a large area that has no white students cannot be integrated, and vice-versa, unless the Fourteenth Amendment imposes a duty upon states to look beyond city and county (and perhaps even sister state) boundaries. It is unlikely that any court would go this far. Nor is the issue whether the state operates a school system that is essentially segregated even though it is not required by positive law. Rather, the problem turns on the equal educational opportunity principle: Has the state provided, within the framework of permissible educational policies, for the fullest possible use of its educational facilities so as to provide as equal an educational opportunity to the greatest number of students, as possible, within its jurisdiction?

STATEMENT OF FACTS

The City of Fenway in the State of Jefferson has a population of 15,700. Slightly over 11,000 of these are white, and approximately 4,500 are Negro. The City has five grade schools and a single high school. Grades one through eight are taught at each of the grade schools and the single high school covers grades nine through twelve.

The city is divided into five grade school districts of almost equal area. Almost all of the Negroes in Fenway live close to the center of the city. The area of School District 5 is about the same as the Negro residential area in the center of the city. Consequently, 95 per cent of all Negro children of grade school age attend Washington School, the grammar school in District 5. The other four grade school districts are located in the suburbs and each has a boundary line contiguous to District 5. The southern boundary of District 5 runs along U.S. Interstate Highway 80, and this highway is the northern boundary of Districts

*EDITOR'S NOTE: The following two comments are briefs argued in the 1965 Moot Court Finals at the University of Missouri School of Law. The issue was the constitutionality of racial imbalance in the public schools. Since this is a timely and important topic, the students were asked to expand their work and submit it to the Missouri Law Review for publication.

The setting of the case is Fenway, Jefferson, a mythical city and state of the United States.

The brief format has been retained in order that the authorities and arguments on both sides may be fully presented.

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3 and 4. District 5 is bounded on the west by the tracks of the Columbus, Springfield & Denver Railroad.

Plaintiffs are six Negro children of grade school age who reside in District 5 and who now attend Washington Grammar School. Plaintiffs bring this action against the School Board of Fenway on behalf of themselves and all others similarly situated.

The parties have stipulated the following facts:

1. The school district boundary lines have been in their present location for the past twenty-five years.[1]

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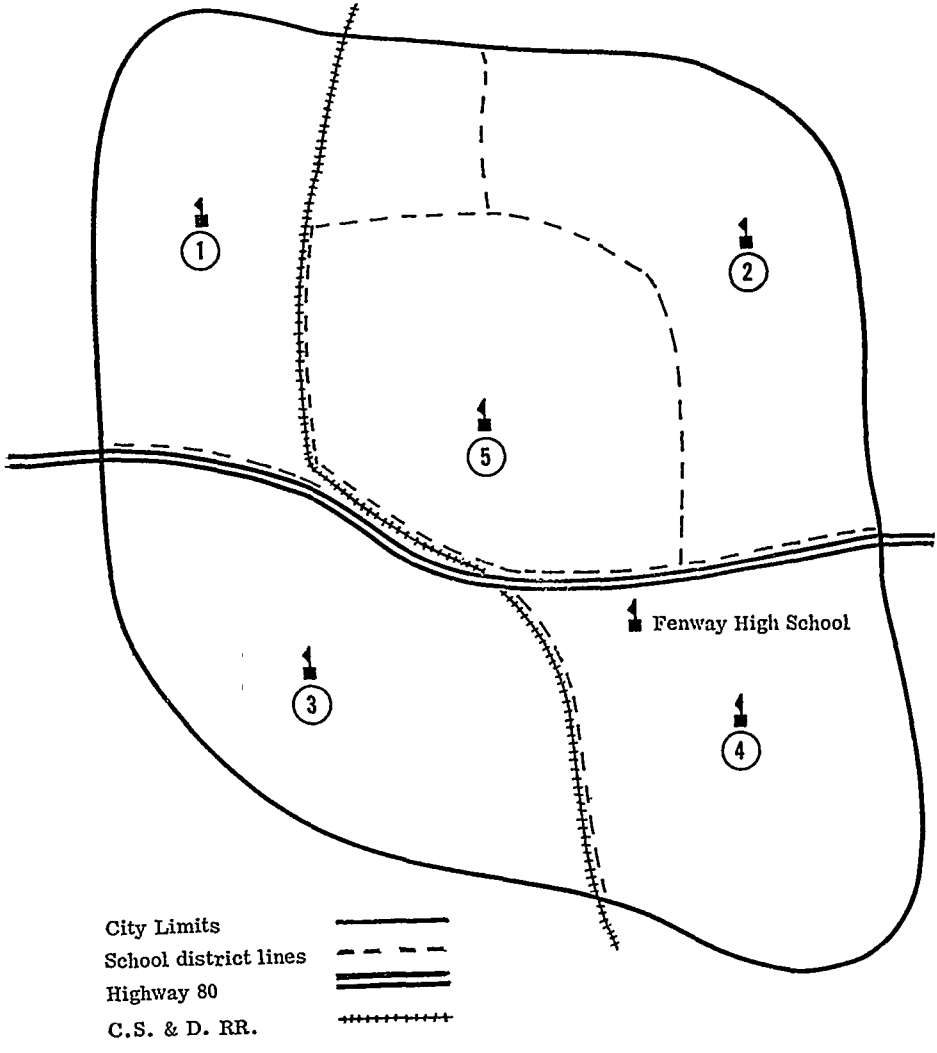
1. Map of Fenway:

CITY OF FENWAY SCHOOL DISTRICTS

This map is not drawn to scale, but does show the relative locations of the school districts.



2. The present boundary lines were not initially located for the purpose of segregating Negroes.

3. Prior to the decision in *Brown v. Board of Educ.*[2] the Negro children living in Districts 1, 2, 3 and 4 were required to attend school in District 5. At that time there was also a high school for Negro students located in District 5 which all Negro students attended.

4. After the decision in *Brown v. Board of Educ.*, all Negro children have been permitted to attend the grade school in the district where they reside. The Negro high school has been closed (all students now attending the one city High School) and the building has since been torn down and replaced with apartment houses.

5. At the time the boundaries of the school districts were established, the population of each district was approximately 3,000. At the present time, the population of District 5 has grown to about 4,500, the greatest influx of new residents being last year, while the population of the other districts has dropped to about 2,800 each.

6. The Washington Grammar School in District 5 is 100 per cent Negro. The grammar schools in the other districts are approximately 98 per cent white and 2 per cent Negro.

7. The School Board has announced that in order to accommodate the increase in population in District 5, additional classrooms and other facilities will be built onto Washington Grammar School, and the school district boundaries will remain unchanged.

8. Prior to this suit, members of the Negro community had met repeatedly with the School Board and had requested that the Board take action to reduce the racial imbalance in the school system but the Board had declined to take any action.

Plaintiffs brought this action in the Circuit Court asking for the following relief:

A. A declaratory judgment that the School Board's refusal to alter the existing district boundaries violates the Fourteenth Amendment.

B. An injunction requiring the Fenway Board of Education to draw new boundary lines so that all Negro children in District 5 will be absorbed in the four contiguous white district schools.

C. As an alternative that the School Board be enjoined from adding onto Washington Grammar School and ordered to draw new boundary lines so as to end the present segregated situation.

D. As a second alternative that the court make such other order as will require the School Board to end the present segregated situation.

The trial court found that there was no discrimination in violation of the Fourteenth Amendment, and denied plaintiffs any relief.

Plaintiffs duly perfected their appeal to the Supreme Court of the State of Jefferson.

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2. 347 U.S. 483 (1954).

THE LOWER COURT ERRED IN FINDING NO DISCRIMINATION IN VIOLATION OF THE FOURTEENTH AMENDMENT AND DENYING PLAINTIFFS RELIEF BECAUSE:

I. THE STATE OF JEFFERSON IS RESPONSIBLE FOR ADMINISTERING AND MAINTAINING A COMPULSORY PUBLIC SCHOOL SYSTEM IN WHICH NEARLY ALL NEGRO STUDENTS ARE CONFINED TO A SCHOOL 100 PER CENT NEGRO AND ALL WHITE STUDENTS ARE CONFINED TO SCHOOLS PREDOMINANTLY WHITE IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Because the prohibitions of the Fourteenth Amendment are addressed to the states, the issue in cases dealing with racially imbalanced schools is often said to be whether there is "state action." But this phrase is little help because the Fourteenth Amendment says nothing about "action" by a state. In fact, it is clear that a state can violate the amendment by inaction.[3] On the other hand, there are some situations where the state may have clearly "acted" and is responsible for what has happened, but the ocurrence may not amount to a denial of rights. The question is not whether or not a state has acted, but rather, under the circumstances has it denied equal protection; that is, because of the character of the state involvement, or the relation of the state to the private acts in issue, has there been a denial of rights for which the state should be held responsible?

Three factors, individually or collectively, will satisfy the constitutional requirements of government responsibility necessary to constitute a denial of rights under the Fourteenth Amendment. First, the state operates and maintains a compulsory system of public education. Second, the state reinforces and encourages private discrimination by maintaining a racially imbalanced school system. Third, the state is aware of the harm that results from racially imbalanced schools. Failure to correct the harm amounts to sanctioning it.

A. *The Government Operates and Maintains a Compulsory System of Public Education*

A traditional and essential function of local government is the maintenance and operation of a public school system. Students are required by law to attend. The government finances this system with public revenue, decides questions of educational policy, and has the power to assign children to the various schools in the system. The Supreme Court characterized this as "perhaps the most important function of state and local governments."[4] Some authors contend that the mere legal compulsion to attend a school which is segregated in fact is sufficient to bring that school within the rule of *Brown*.[5] Such a finding would, of course, require remedial action by the board.

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3. In Lynch v. United States, 189 F.2d 476 (5th Cir. 1951), state police officials allowed a mob to beat Negoes who the officers had arrested. In Catlette v. United States, 132 F.2d 902 (4th Cir. 1943), an officer passively allowed a mob to assault members of an unpopular religious sect.

4. Brown v. Board of Educ., *supra* note 2, at 493 (1954).

5. Wright, *Public School Desegregation: Legal Remedies For De Facto Segregation,* 40 N.Y.U.L. REV. 285, 296 (1965).

The school system in Fenway, as in most cities, operates on the "neighborhood school plan." According to this plan, school district lines are drawn to encompass a small, contiguous "neighborhood," and children attend the school that serves their particular neighborhood. Generally the district lines are drawn with regard to location and capacity of various schools, population in the particular area, and safety and convenience of children going to and from school. It may be contended that since the neighborhood school plan is based solely on geographic criteria and community convenience there is no ground for constitutional attack. However, this is not the case.

Contrary to popular lay conception, no "right" exists to attend the school nearest one's home or in the district in which one lives. No "right" can be found in common law, the Constitution, or any statute. Likewise, the neighborhood school plan, which is used in Fenway, is not a constitutional mandate. It is nothing more than an educational policy, only one of several from which a school board may choose in administering its system. Educational policies and standards of placement are subordinate to constitutional rights.[6]

In 1940, the Fenway School Board was faced with a choice in determining school attendance. It had many options available to it, but it chose to use geographic criteria. The effects of that choice have resulted in the racial imbalance existing in Fenway today.

It is not contended that the present district lines were initially located for the purpose of segregating Negroes. Nor is it contended that the school board is responsible for the residential pattern that has resulted in the Negro ghetto in the center of Fenway. Instead, it appears more and more that such racially concentrated residential patterns are the result of social complexities that seem to crystallize in private discrimination in the areas of employment and housing.[7] The point is that the Negro does not have the same ability to choose his residence as the school board has to choose its attendance plan.

The pattern of population, as well as geography and safety, is one of several considerations before the Board when it chooses a method to determine school attendance. In fact, the Board is required to consider this factor. In *Dowell v. School Bd. of Educ.*,[8] Negroes lived in easily definable areas similar to those in

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6. Dove v. Parham, 282 F.2d 256, 258 (8th Cir. 1960).

7. In Dowell v. Bd. of Educ., 244 F. Supp. 971 (W.D. Okla. 1965), the court took judicial notice of the continuing subordinate position Negroes hold on the economic ladder; and that there was resistance in all white communities to Negroes who sought to obtain housing there. The point was also recognized in Jackson v. Pasadena City School Dist., 59 Cal.2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963), although in that case the court went on to find that the imbalance was intensified by the purposeful and unreasonable action on the part of the board. Judge Skelly Wright of the United States Court of Appeals of the District of Columbia has concluded, "more and more it is becoming apparent that perhaps the primary cause of de facto segregation in urban schools is the socio-economic condition of the Negro. The inability of many Negroes, because of overt and covert job discrimination, to find proper employment drives them and their families into the segregated slums which disgrace many of our metropolitan areas." Wright, *supra* note 5, at 290.

8. *Supra* note 7.

Fenway. The court found that drawing school zone lines without regard to residential patterns would improperly continue segregation, and condemned the practice. While the Fenway Board may not have been racially motivated, it must have been aware that a racially imbalanced school would result from the way it drew the district lines. Although the board could have used an entirely different method of determining school attendance, it deliberately chose the one method which could only result in the present racial imbalance—geography.

If, in determining the district lines, the Board considers the economic and social restraints on the Negro, this is tantamount to active gerrymandering, held illegal in *Clemons v. Board of Pub. Educ.*[9] It will surely be argued that nothing points to gerrymandered districts in Fenway, and that the districts are in no way irregular but are rather based on reasonable geographic factors. However, the establishment of school zones with the knowledge that a racially imbalanced school will result is no more defensible than considering racial patterns for the purpose of attaining the same goal. As was suggested in a recent article,

> Traditional gerrymandering consists of abnormally shaped zones, but the concept could be extended to cover a community where the school board's policy toward the imbalance is one of approval and, although existing attendance zones are geographically justified, other zoning plans that would not result in imbalanced schools are equally acceptable in geographic terms.[10]

While a school board generally has a great deal of discretion in drawing school district lines, its judgment must rest on legal and valid grounds. Furthermore, merely because an attendance zone appears to be compact is not necessarily the controlling factor. In addition to compactness, the Board must consider residential patterns, local customs and practices which limit the area in which Negroes live, and other factors that would affect the result.[11]

One such factor is the past practice of a Board which may affect the present situation. It was stipulated that prior to 1954 all Negro children living in Fenway were required by law to attend school in District 5. There was, then, a biracial school system in Fenway, and the effects of that system are still felt today. Where cessation of past segregation policies is insufficient to bring about more than token change in a public school system, the school board must take affirmative action reasonably designed to effectuate the desegregation goal.[12] The past practice of segregation, combined with the present attitude of the board, results in the same racial imbalance in the schools and the consequent harm to children that was prohibited in *Brown*.[13]

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9. 228 F.2d 853 (6th Cir. 1956).
10. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 599 (1965).
11. Dowell v. Board of Educ., *supra* note 7, at 980.
12. *Id.* at 978-79.
13. *Supra* note 10, at 602.

B. *By Maintaining a Racially Imbalanced School System the State Reinforces and Encourages Private Discrimination*

The actions of private persons in certain circumstances, when sanctioned or reinforced by an arm of the state, amount to state or governmental responsibility. Thus, political parties in *Smith v. Allwright*[14] and *Rice v. Ellmore*,[15] proprietors of a company-owned town in *Marsh v. Alabama*,[16] and lessees of governmental property in *Burton v. Wilmington Parking Authority*[17] have been deemed to be acting as the state in certain situations.

In *Shelley v. Kraemer*[18] the Supreme Court struck down judicial enforcement of racial restrictive covenants in housing as constituting state action forbidden by the Fourteenth Amendment. The case thus stands for the proposition that the state may not give discriminatory acts of private persons the force of law. Does not the local school board violate that proposition when it operates essentially segregated schools? By reinforcing acts of private discrimination, the board assures private persons that if they are able to keep their neighborhoods segregated their schools will be segregated also.

The school board certainly must have been aware of the fact that its choice of geographic factors to determine school attendance would also influence the residential pattern. The nature of the public school often plays an essential role in a family's choice of a neighborhood. Just as the residential pattern affects the racial composition of the school, the racial composition of the school affects the residential pattern. By adhering to geographic criteria, the board assures the parent who does not want his children to go to school with Negroes that he can accomplish his goal by moving into a white neighborhood. If it were within the power of those protesting the imbalanced school to eliminate the residential pattern, responsibility might be shifted away from the government. However, as pointed out, economic disabilities, the anticipation of a hostile reception in a white neighborhood, and racial discrimination in housing deprive most Negroes of any choice to move out of the ghetto.[19] The school board has no such restrictions on it when it makes its choice. The result is that the board has sanctioned private discrimination that has resulted in a ghettoized residential pattern and has reinforced this through its rigid use of geographic criteria.

The effect on the children was pointed out in the appendix to appellants' brief in *Brown*:

> The child who . . . is compelled to attend a segregated school may be able to cope with ordinary expressions of prejudice by regarding the prejudiced person as evil or misguided; but he cannot readily cope with symbols of authority, the full force of the authority of the state—the school or the school board, in this instance—in the same manner. Given both the ordi-

14. 321 U.S. 649 (1944).
15. 165 F.2d 387 (4th Cir. 1947).
16. 326 U.S. 501 (1946).
17. 365 U.S. 715 (1961).
18. 334 U.S. 1 (1948).
19. *Supra* note 7.

> nary expression of prejudice and the school's policy of segregation, the former takes on greater force and seemingly becomes an expression of the latter.[20]

By recognizing and sanctioning the private discrimination that perpetuates racially concentrated residential patterns, the board thereby enhances awareness of the social differences and feelings of inferiority that the Supreme Court in *Brown* found to violate the Fourteenth Amendment.

If the School Board of Fenway were to draw up this same attendance plan today and present it to the Supreme Court, would the Court allow it merely because the word "Negro" is not mentioned, the plan being cast only in terms of residence? Clearly the state could not pass a law that would create the present situation in Fenway. But by strictly following these same geographic criteria in the face of the severe racial imbalance in Fenway, the Board is sanctioning, approving and encouraging the very factors that have brought about the imbalance. Such inflexible adherence to the neighborhood school policy has been held to unlawfully maintain and extend school segregation.[21]

C. *The State Has Failed to Correct the Harm Caused by the Racial Imbalance. This Inaction by the State Amounts to Sanctioning the Harm in Violation of the Fourteenth Amendment*

The effect of adherence to geographic criteria on residential patterns has already been pointed out. There is yet another reason for holding the school board responsible. The state has drawn the district lines and it is within the power of the state alone to change them. The state is aware of the imbalance and the resulting harm. Therefore, any failure to remedy the forbidden harm due to inaction only causes further harm. Members of the Negro community in Fenway have met repeatedly with the school board to request that action be taken to reduce the racial imbalance. The board's only response has been an announcement of plans to build a new addition to the Washington School, which will only assure continued racial imbalance in the system. Such persistent refusal to alleviate the situation can only amount to a sanctioning of the district lines as they presently exist.

Catlette v. United States[22] upheld the conviction of an officer who passively allowed a mob to assault a group of Jehovah's Witnesses. *Lynch v. United States*[23] condemned state police officials who allowed a mob to seize and beat Negroes the police had arrested. Similarly, "inaction" on the part of school officials may also amount to a denial of constitutional rights. Gerrymandering of district lines, allowing transfer privileges for whites only, or the strategic building of schools in such a way as to insure continued segregation are devious tactics designed to permit the school board to continue a policy of active segregation. Where it is clear that the neighborhood school plan is used as a subterfuge to allow the use of such

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20. *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427, 433 (1953).
21. Dowell v. Board of Educ., *supra* note 7, at 977.
22. *Supra* note 3.
23. *Supra* note 3.

tactics, there is no doubt that such an "active" policy would constitute state action.

But the Fenway School Board need take no action at all to insure continued racial segregation. *Taylor v. Board of Educ.*[24] held that inaction that results in segregation is just as culpable as an active policy that is followed for the same purpose. In that case the New Rochelle School Board had created the Lincoln School as a racially segregated school. It maintained the school as such by gerrymandering the district it served from time to time. Gerrymandering ceased in 1934 and since that time the attendance area lines had not been changed. Until 1949 the board followed a transfer policy which allowed white students to transfer out of the district in question, while refusing transfers to Negroes. In that year the board instituted the neighborhood school plan, which assigned students on the basis of their residence. The result of this new policy was that 94 per cent of the children attending the Lincoln School were Negroes. As the appellate court stated, the result was a "freezing in of segregation."[25]

The plaintiffs sued on the basis that this was segregation which resulted from intentional acts on the part of the school authorities. They sought to enjoin the board from enrolling them in Lincoln School, to require the board to register them in a racially integrated school and to enjoin the building of a new school on the site. The district court granted relief on the basis that the board had not acted in good faith to implement desegregation and that its conduct since 1949 had been motivated by the desire to maintain the school as racially segregated.

The significant aspect of *Taylor* to the present case is that the school board had dropped its policy of active segregation through the gerrymandering process *eleven years* before the action was commenced. Furthermore, the consensus of the testimony of expert witnesses appeared to be that racial conditions in the Lincoln School district at the time of the suit were no longer a result of the manner in which the school board had previously mapped the district, but a result of the voluntary influx of Negroes into the general neighborhood.[26] Thus, the school board had long abandoned active discrimination, and the population of the originally gerrymandered school district had remained largely Negro. This resulted not because the board had altered the district boundaries to encompass most or all of any new Negro arrivals, nor for any reason involving action by the board. Rather, the resulting ghetto occurred because old Negro inhabitants of the district remained within its boundaries, and new Negroes settled within them. Since the board had been "inactive" in promoting a policy of segregation for eleven years, the racial imbalance was therefore not the result of official policy or activity. It was, however, just as "sanctioned by law" and just as infected with segregation as if it were based on racial factors.

Further parallels between *Taylor* and the case at bar help to illustrate the point. Both boards used geographic criteria. Both created and maintained a state imposed bi-racial school system for a time, and then continued to maintain the

24. 191 F. Supp. 181 (S.D.N.Y. 1961).
25. Taylor v. Board of Educ., 294 F.2d 36, 39 (2d Cir. 1961).
26. *Id.* at 43 (dissenting opinion).

same district lines. Both imposed a "no-transfer" policy on the neighborhood school plan. Both sanctioned an attendance plan which continued to keep one or more schools segregated. And both allowed segregation to continue through their "inaction." Thus, for the Fenway School Board to say it is not responsible for the segregation because it has ceased its wrongdoing is not to say it has absolved itself of the results. These are two vastly different things. The present effects of past segregation policies will disappear only when the board has taken steps on its own to eliminate them.

Branche v. Board of Educ.[27] differs somewhat on its facts from *Taylor,* but is a logical extension of its reasoning. The case came before the court on a motion to dismiss plaintiffs' petition which alleged "maintenance of racially segregated public grade schools"[28] in Hempstead, Long Island. The defendant school board had not gerrymandered school zones for the purpose of segregation when it plotted them in 1949. Instead, it had adopted a resolution requiring school children to attend the school in the zone of their residence. Plaintiffs, Negro school children, were residents of districts whose Negro populations had increased since 1949 so that the increases, in conjunction with the board's 1949 resolution, resulted in the schools being predominantly Negro. The school district contained eight schools in six zones. The percentages of Negro students in the respective zones were 86, 78, 67, 33, 5, and 1. The total Negro population in the whole district was 47 per cent. At the time of the suit the board was planning to enlarge the heavily Negro populated second and third zones. The board answered plaintiffs' prayer for an injunction with affidavits setting out the above facts, argued that the facts demonstrated no discrimination on its part, and moved for a summary judgment. The court denied defendant board's motion for two reasons. First, it seemed to feel that the board might have been racially motivated as in *Taylor.* More important, however, the court found that the board had failed in its duty to correct the situation for which it was in large part responsible. The court flatly stated, "failure to deal with a condition as really inflicts it as does any grosser imposition of it."[29] The court saw no difference between an active segregation policy and the failure to correct a segregated situation.

The case of *Blocker v. Board of Educ.*[30] further supports the argument that school boards may not put the sole responsibility for segregated schools on residential patterns if they reinforce such patterns by their own action or "culpable inaction." This suit was a class action to declare the public schools of Manhasset, Long Island, racially segregated. The district in question included three elementary schools. Of a total of 1340 students, 600 were served by one school with a three-square mile area; 574 by another school with a two-square mile area; and 166 by the school in question with a one-half square mile area. The first two of these schools were entirely white and the third 99.2 per cent Negro. The attendance lines had been drawn in 1929 and had not been changed at the time of the suit.

27. 204 F. Supp. 150 (E.D.N.Y. 1962).
28. *Ibid.*
29. *Supra* note 27, at 153.
30. 226 F. Supp. 208 (E.D.N.Y. 1964).

Evidence showed that the teachers had been greatly concerned about the situation in the district and had communicated their concern to the school board. There was no proof that the original drawing of the zone lines had been motivated by racial considerations, but the court felt that a failure to revise the attendance lines when there was no justification for not doing so was tantamount to racial motivation.

The court made no sweeping pronouncement that integration was required in all cases. But it did state in unequivocal terms that there was a constitutional duty not only to cease educational policies that resulted in the segregated schools, but to correct the imbalance as well. The court reasoned that the school board was, and for several years had been, aware of the total separation of the entire Negro population from over 99 per cent of their white contemporaries. If the board were to set up the same attendance plan today it would be regarded as a device to separate the races. Since the board had knowledge of the separation, the court reasoned that the continuation of the present attendance plan could no more be insulated from the Fourteenth Amendment than if it were drawn up and presented as a new plan.[31]

Further discussing government responsibility, the court left no doubt that the state was not only responsible for the imbalance, but was under a duty to correct it. In ordering the school board to end the racial imbalance, the district court held

> the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In the light of the existing facts, the continuance of the defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation. . . .
>
> In a publicly supported, mandatory state educational system, the plaintiffs have the civil right not to be segregated, not to be compelled to attend a school in which all of the Negro children are educated separate and apart from over 99% of their white contemporaries. That they are being so compelled is a fact.[32]

Since the school board fixed attendance lines, the court argued that the board must determine when, if ever, these policies should be modified. By failing to change the attendance lines the defendant board had transgressed the prohibitions of the Fourteenth Amendment.[33]

Surely the Fenway board is as guilty of this transgression as was the board in *Blocker*. Both had a past history of segregation and both permitted it to continue through "inaction." Similarly, in *Dowell*[34] the court rejected the board's position that it had no affirmative duty to adopt remedial policies. Failure to adopt a policy was a policy in itself.[35] The court went on to find a duty to *disestablish* segregation in public schools where segregation policies were in force and their

31. *Id.* at 225-26.
32. *Id.* at 226-27.
33. *Id.* at 227.
34. Dowell v. Board of Educ., *supra* note 7.
35. *Id.* at 975.

effects had not been corrected.[36] The failure of the state to correct the imbalance is tantamount to state imposed segregation. Neither can be condoned.

II. THE CONSTITUTION REQUIRES THE STATE TO PROVIDE EQUAL EDUCATIONAL OPPORTUNITIES IN ITS PUBLIC SCHOOL SYSTEM: IT IS THE HARM CAUSED BY RACIAL IMBALANCE, NOT THE RACIAL IMBALANCE ITSELF, THAT IS PROHIBITED. IT MAKES NO DIFFERENCE HOW THE IMBALANCE COMES ABOUT.

The underlying theory in most protests against segregated and racially imbalanced schools is that the educational opportunity afforded Negro children is unequal to that afforded children attending the other public schools of the community. This theory rests on the principle that the equal protection clause requires equality of educational opportunity. Although this principle is derived primarily from recent cases, it is also consistent with earlier interpretations of the Fourteenth Amendment.

In earlier cases the Supreme Court often looked to the spirit and over-all purpose of the amendment when read together with its two sister Civil War Amendments—the Thirteenth and Fifteenth. Broad language in these cases indicates that the guarantee of equal protection is that a person shall not be denied a benefit because of his race as a result of state action. This principle is discussed thoroughly in *The Slaughterhouse Cases*[37] and in *Strauder v. West Virginia*,[38] where Mr. Justice Strong said of the Fourteenth Amendment:

> The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the conditions of a subject race.[39]

It has been argued that the case of *Plessy v. Ferguson*,[40] which laid down the "separate but equal" doctrine, was a withdrawal from this principle. This is not true, however, for the Court in *Plessy* undertook to show that segregation did not really disadvantage the Negro except through his own choice.[41]

More recent interpretations by the Supreme Court clarify the principle. In *Sweatt v. Painter*[42] the state of Texas offered to match the educational opportunity it afforded white law students by building a law school for Negroes. The attempted segregation failed when the Negro plaintiff's admission to the white University of Texas Law School was compelled. The Court decided that the edu-

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36. *Id.* at 981.
37. 83 U.S. (16 Wall.) 36 (1873).
38. 100 U.S. 303 (1880).
39. *Id.* at 307-08.
40. 163 U.S. 537 (1896).
41. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 420, 421 (1960).
42. 339 U.S. 629 (1950).

cational opportunity offered the Negro was unequal. There was no "substantial equality in the educational opportunities offered white and Negro law students by the State."[43] In measuring the quality of the educational opportunity the Court did not stop at such measurable factors as the number of faculty members, variety of courses, opportunities for specialization, size of student body, size of the library, and availability of law review and other activities. What was more important, Chief Justice Vinson found, was that the white University of Texas Law School possessed "to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school."[44]

The equal educational opportunity principle was reinforced by a unanimous court in *McLaurin v. Oklahoma State Regents,*[45] where a Negro graduate student was admitted to an otherwise all white school, but was separated from the whites in the classroom, library, and cafeteria. The Court condemned these restrictions on the ground that they rendered his educational opportunity inferior. The Court found that "such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his trade."[46]

Finally, in *Brown v. Board of Educ.*[47] the Court laid down the basic principle: the educational opportunity afforded in the public schools must be made available to all on equal terms. The Court first addressed itself to the question presented: "Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities?"[48] The Court assumed that the physical facilities and other tangible factors were equal, and went on, through a series of logical steps, to establish the relationship between segregation and the impairment of educational opportunity that was found repugnant to the Fourteenth Amendment. First, a Negro public school does not possess those qualities, enumerated in *Sweatt,* that are "incapable of objective measurement"[49] but critical in determining the quality of the educational opportunity. Second, the Negro child compelled to go to a Negro school is deprived, even more than in *McLaurin,* of the educationally important opportunity to engage in discussion and exchange views with white students.[50] Third, to separate Negro school children from their peers, solely because of their race, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[51] This would have an "effect on their educational opportunities"[52] since a "sense of inferiority

43. *Id.* at 633.
44. *Id.* at 634.
45. 339 U.S. 637 (1950).
46. *Id.* at 641.
47. 347 U.S. 483 (1954).
48. *Id.* at 493.
49. *Ibid.*
50. *Id.* at 493-94.
51. *Id.* at 494.
52. *Ibid.*

affects the motivation of the child to learn."[53] The Court then concluded: "Separate educational facilities are *inherently* unequal."[54] (Emphasis added.)

It should be noted that *Brown* was a case in which the state required segregation. However, the Court decided the case on the equal educational opportunity principle. Thus, the Court was far more concerned with the effect on the children as a result of segregation rather than the cause of the segregation. It is often pointed out that the Court could have reached the same result in *Brown* on different grounds, declaring the segregation unconstitutional under the broad language of *Strauder* and earlier interpretations of the Fourteenth Amendment.[55] The Court could have struck down the segregation on the grounds that it constituted an unreasonable, arbitrary classification offensive to the due process clause.[56] The significant point, however, is not how the Court *could have* decided the case, but how it *did* decide the case. It decided on the basis of the equal educational opportunity principle, thus elevating that principle to constitutional status.

III. The Fourteenth Amendment Requires The State to Correct the Imbalance.

A. *The Rule of Brown v. Board of Educ. Requires Affirmative Action by the State*

Once a denial of equal protection is established to bring the case within the rule of *Brown* then affirmative action to remedy the imbalance is called for. Recognition of the inequality resulting from racially imbalanced schools has led to a growing body of state law that racial imbalance in public schools is in and of itself harmful and illegal, and that a segregated school is inherently unequal *whatever* the reasons underlying the segregation. Massachusetts has gone so far as to pass a statute on the subject. The act declares that racial imbalance shall be deemed to exist when the percentage of non-white students in any public school is in excess of fifty per cent of the total number of students in such school.[57] The act goes on to provide for witholding state funds from any district that fails to take action to remedy the imbalance.[58]

In addition, there are a number of state reports showing a trend toward elimination of racial imbalance. The most important of these is *Mitchell v. Board of Educ.*,[59] where the New York State Commissioner announced that the racial im-

53. *Ibid.*
54. *Id.* at 495.
55. See textual discussion of *Slaughterhouse* and *Strauder* at notes 37 and 38, *supra.*
56. In Bolling v. Sharpe, 347 U.S. 497 (1954), decided the same day as Brown, the Court used the due process clause of the Fifth Amendment to prohibit segregated schools in the District of Columbia.
57. Mass. Gen. Laws ch. 71, § 37D (1965).
58. Mass. Gen. Laws ch. 15, § 1I (1965).
59. 8 Race Rel. L. Rep. 735 (1963). In addition, see *Memorandum by New York State Commissioner of Education,* 8 Race Rel. L. Rep. 738 (1963); Fischer v. Board of Educ., 8 Race Rel. L. Rep. 730 (1963); Jackson v. Pasadena City School Dist., 59 Cal.2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963); *Racial Imbalance in the Public Schools—Legislative Motive and the Constitution,* 50 Va. L. Rev. 464, 502-529 (1964).

balance existing in a school with wholly or predominantly Negro enrollment "interferes with the achievement of educational opportunity." He went on to observe that

> modern psychological and sociological knowledge seems to indicate that in schools in which the enrollment is largely from a minority group of homogenous ethnic origin, the personality of these minority group children may be damaged. There is a decrease in motivation and thus an impairment of ability to learn. Public education in such a situation is socially unrealistic.[60]

The Commissioner reiterated the underlying rationale of *Brown*: it is the harm that results from attending a school composed predominantly of children of the same racial origin that violates the Constitution. Whether the separation of Negroes is required by statute, fostered by manipulations of district lines and school attendance plans, or permitted to continue through the inaction of the local school board, the resulting harm to the Negro school children is the same. It makes no difference how the separation comes about. As was pointed out by the *Blocker* court, elementary school children "are not so mature and sophisticated as to distinguish between the total separation of all Negroes pursuant to a mandatory or permissive state statute"[61] and separation which arises from residential factors.

The *Branche* court, too, found the Constitution to forbid not only the denial of equal protection when it was violated by positive law, but also when that same denial is brought about through culpable inaction or lax school board administration. The court recognized that segregated education is inadequate.[62] It supported the rationale of *Brown* and recognized that "the central constitutional fact is the inadequacy of segregated education."[63] It then demanded some remedial action from the educational system which must deal with the inadequacy arising from adventitious segregation: "it cannot accept and indurate segregation on the ground that it is not coerced or planned, but accepted."[64]

> So here it is not enough to show that residence accounts for the fact of segregation and to contend that therefore the segregation is ineluctable. The effort to mitigate the consequent educational inadequacy has not been made and to forego that effort to deal with the inadequacy is to impose it in the absence of a conclusive demonstration that no circumstantially possible effort can effect any significant mitigation. What is involved here is not convenience [of the school board] but constitutional interests.[65]

The reports of psychologists and sociologists confirming the harmful effect on Negro children are too numerous to mention. In addition, there is no evidence whatsoever to indicate that the intensity of this harm is lessened because the

60. Mitchell v. Board of Educ., *supra* note 59, at 737.
61. *Supra* note 30, at 229.
62. *Supra* note 27, at 153.
63. *Ibid.*
64. *Ibid.*
65. *Ibid.*

segregation is not required by positive law or policy. The court in *In re Skipwith*[66] recognized this by way of dictum, observing that the defects of segregated education are inherent and incurable *no matter what the cause of the segregation.*[67] It then went on to find that the record supported the contention that the separation of children by race, "whether it be the result of governmental action or of private housing segregation, creates factors inimical to the full and equal educational opportunities."[68] A school child is not capable of distinguishing between state imposed segregation on the one hand, and "non-state imposed segregation" on the other.[69]

Education is not only one of the most crucial factors in determining the course of every individual's life, but it has a most profound effect on determining the very character of our society. The injurious effect that segregated schools have in retarding education is an essential factor in society. This was stated by the dissent in *Carr v. Corning* in language equally applicable to compulsory or actual segregation: "Instead of serving the public purpose it [segregation] fosters prejudice and obstructs the education of whites and Negroes by endorsing prejudice and preventing mutual acquaintance."[70]

This recognition of the importance of contact and interaction between children of different cultural and racial backgrounds was also supported by the New York Commissioner's Advisory Committee on Human Relations and Community Tensions. Its report stated: "The presence in a single school of children from varied racial, cultural, socio-economic and religious backgrounds is an important element in the preparation of young people for active participation in the social and political affairs of our democracy."[71] The Committee felt that racially imbalanced schools are socially unrealistic and wasteful of manpower and talent, whether they occur by law or fact.

Failure to provide equal educational opportunities is inexcusable when there are reasonable means to do so. *Brown* aimed at correcting the harm suffered by Negro children in segregated learning conditions. Such conditions still exist due to a dubious distinction as to how the segregation arises. To permit continued segregation on the basis of such a questionable distinction is intolerable.

B. *The Equal Protection and Due Process Clauses of the Fourteenth Amendment Require Affirmative Action by the State*

The school board may argue that its method of determining school attendance is rationally related to the purpose of education and the courts must therefore ignore the resulting segregation. But when attempting to justify racial classifications, the state bears a heavier burden than merely showing it is rationally related to its goal. As stated in *McLaughlin v. Florida*,[72] state action resulting in

66. 14 Misc.2d 325, 338, 180 N.Y.S.2d 852, 866 (1958).
67. *Ibid.*
68. *Ibid.*
69. For discussion see Drinan, *Racially Balanced Schools: Psychological and Legal Effects*, 11 CATHOLIC LAW. 16 (1965).
70. 182 F.2d 14, 32 (D.C. Cir. 1950).
71. SILBERMAN, CRISIS IN BLACK AND WHITE 298 (1964).
72. 379 U.S. 184, 191 (1964).

racial segregation will be upheld "only if it is necessary, and not merely rationally related to, the accomplishment of a permissible state policy."[73] Any Board argument to the effect that some necessity exists to justify racial segregation is nullified by the Supreme Court's statement that "Segregation in public education is not reasonably related to *any* proper governmental objective . . . ."[74] (Emphasis added.)

Thus, an intent to segregate may be inferred unless officials can show not that their action is reasonably related to a proper governmental purpose, but that there is no reasonable way to accomplish that purpose without segregation. Professor Sedler refers to this as the "reasonable alternative" doctrine.[75] Where a state can accomplish its object [education] without interfering with a recognized right [right to an equal educational opportunity], but chooses a method which, while accomplishing the object, also interferes with the right, its failure to choose the reasonable alternative violates the Fourteenth Amendment. The principle has been applied most frequently in the areas of economic regulation and freedom of speech.[76]

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73. *Id.* at 196.

74. Bolling v. Sharpe, *supra* note 56, at 499-500.

75. Sedler, *School Segregation in the North and West,* 7 ST. LOUIS U.L.J. 228 (1963).

76. In Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926), the state unintentionally prohibited the sale of certain goods when it could have accomplished the desired result by regulation. The Court held that failure to adopt the reasonable alternative constituted excessive regulation. The same principle was applied in Burns Baking Co. v. Bryan, 264 U.S.504 (1924). There the state passed a statute for the purpose of preventing short weights in the sale of bread. Because of baking practices, the measure had the undesired side-effect of prohibiting the sale of unwrapped bread. The Court found that the state could have achieved its object through other equally effective methods which would not have had the effect of prohibiting the sale of unwrapped bread, and declared the measure unconstitutional.

The principle was also applied in W. B. Worthern Co. v. Thomas, 292 U.S. 426 (1934), where the Court struck down a statute exempting proceeds of life insurance policies from execution. While the statute accomplished the legitimate governmental purpose of protecting needy debtors, it also had the effect of destroying the rights of all past judgment creditors. Since the state could have achieved its goal without the undesirable side-effect, the state's failure to employ a reasonable alternative was found to violate the rights of the creditors.

Admittedly, these cases are in the area of economic regulation and the courts have more recently deferred to legislative discretion in that area. Nevertheless, it is still the task of the courts to decide whether the means chosen to achieve the governmental goal are constitutional and properly related to that goal. Staten Island Loaders v. Waterfront Comm'n, 117 F. Supp. 308, 310 (S.D.N.Y. 1953).

The doctrine has also been appplied in the area of free expression. In Schneider v. New Jersey, 308 U.S. 147, 164-65 (1939), the ordinance in question, which the city contended was necessary to prevent littering in the streets and fraudulent appeals to householders, was applied to a person distributing religious literature. The Court invalidated the ordinance on the ground that the city could find other ways to prevent such harm without destroying the opportunity to disseminate religious literature. In response to the city's claim that alternative methods of accomplishing its purpose were not as efficient or convenient, the Court answered that "considerations of this sort do not empower a municipality to abridge freedom of speech and press." Similarly, in Talley v. California, 362 U.S. 60 (1960), the

The principle is equally applicable in the area of school segregation. In the *Branche* case the court denied defendant board's motion for a summary judgment, even though there was no evidence that the board maintained an active policy of segregation. It recognized that the requisite state action was present in the operation of the school system. More important, it found that the state was causing great harm when it required children to attend school on a segregated basis due to the fact that the neighborhood where they lived was segregated. The main thrust of the opinion was that the state could not ignore the harm caused by actual segregation if there was something it could do about it. The court stated:

> The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted.[77]

The language of the court is very similar to that of the "reasonable alternative" cases. The case is significant in that (1) it recognizes that the state is in effect causing psychological harm and denying equal educational opportunities when schools are factually segregated, despite the absence of a policy of segregation; and (2) the state must make an effort to mitigate the harmful consequences of segregation if this can be done practicably.

The method adopted by the Fenway School Board, the neighborhood school plan, is only one of several rational ways to determine school attendance. At the time the district boundary lines were drawn the population of each district was approximately 3000; thus the school in each district was capable of handling about the same number of children. Since that time, however, the population of District 5 has grown to 4500 while the population of the other four districts has decreased to only 2800. This has resulted in overcrowding of the Washington School in District 5 and consequent availability of space in the other districts. The board could easily install an "open transfer plan," whereby any Negro student could choose to transfer to one of the underpopulated schools.[78] This could be done without any inconvenience or disruption of the educational system because of the small size of Fenway. The Negro children living on the fringe area of District 5 could walk to the closest white school in many cases, particularly to the school in District 2 (see map of Fenway *supra* note 1). Short bus rides would accommodate any Negro child living in the center of District 5 who wished to transfer. This would not only reduce the harm caused by racial imbalance, but

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Court laid down the rule that the state must bear the burden of showing it could not accomplish its objective by a regulation rather than a prohibition.

In another situation the Court indicated that at least one basis for its decision was that the state could have accomplished its purpose without destroying the rights of persons. In Barnette v. Board of Educ., 319 U.S. 624 (1943), the Court observed that the school board could have taught patriotism by requiring courses in American history rather than by requiring children to salute the flag against their religious beliefs.

77. Branche v. Board of Educ., *supra* note 27, at 153.

78. For favorable comment see authorities discussed in Auster, *De Facto Segregation,* 6 WM. & M.L. REV. 41, 56 (1965).

would also mitigate the overcrowded condition in the Washington School without inconvenience to the school authorities.

By adopting the open transfer plan the Board could prevent feelings of racial inferiority.[79] To maintain the present method and build an addition to Washington School would only assure continued racial imbalance. The result is that the Board would not give each child an equal educational opportunity. Both methods enable the state to educate the children. But since the state could accomplish its object without causing feelings of inferiority, and without interfering with the operation of the school system, its failure to choose the reasonable alternative offends the Fourteenth Amendment.

The same holds true with other techniques for determining school attendance, such as redrawing the district lines so as to cut through the Negro ghetto rather than surrounding it; adoption of the "Princeton Plan";[80] strategic site selections for new schools on the fringe areas of the ghetto; enlargement of the attendance zone(s); or any combination of remedies. If one choice would prevent actual segregation and its resulting harm, and at the same time not interfere with the operation of the school system, there is no reason why the board should not adopt that choice. Its failure to choose the reasonable alternative is unjustifiable since the harm could be easily eliminated. In other words, the reasonableness of the board's action must be considered in the light of the harm actual segregation does to Negro students.

In theory the neighborhood school plan is perfectly sound. However, the very term "neighborhood school" implies that the school is capable of competently serving the neighborhood in which it is located. If that school is not adequate to perform the prime function of a school—if it is not capable of giving the people it serves an equal educational opportunity—then it is merely playing with words to call it a neighborhood school. If the school is not capable of offering its students an equal educational opportunity, it then becomes the function of the school board to take whatever steps are necessary so that the school can adequately perform its function.

Respondent board may contend that if they adopt the open transfer plan, they will have to let any white children that wish to transfer do so also, resulting in the disruption of the educational system. But this argument overlooks realities. First of all, it is unlikely that white children would want to transfer. More important, however, it is perfectly justifiable to permit only Negoes to transfer. It is well settled that a state does not deny equal protection by giving a benefit to a group that needs it while denying the same benefit to a group that does not.[81]

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79. It might be argued that many Negroes won't want to transfer, and therefore won't get an equal education. The answer is that while it may be desirable that each child receive an equal education it is not required. The Constitution requires only that each child be given an equal educational *opportunity*.

80. According to this plan, two schools are paired and serve the same area. One school is used for grades 1-4 and the other for grades 5-8.

81. Justice Frankfurter observed, "The Constitution does not require things which are different in fact or opinion to be treated in law as if they were the same." Tigner v. Texas, 310 U.S. 141, 147 (1940) (dissenting opinion).

The basis for the holding in *Brown* was that the Negro students suffered feelings of inferiority as a result of segregation. It therefore follows that he needs to be relieved of the consequences incident to the segregated learning situation. There is no evidence that white children suffer any feelings of inferiority due to their race. Consequently, they have no need to transfer.

The board might object that it cannot use race at all in determining school attendance because the "Constitution is color blind."[82] Thus, it is argued, no recognition to race may be given at all.[83] However, it is hard to take this argument seriously. First, the Thirteenth, Fourteenth and Fifteenth Amendments were designed to protect Negroes. Second, nothing in *Brown* prohibits recognizing race to relieve an inequality. Finally, courts have clearly recognized that the Negro minority may have entirely different needs than the white majority.[84] Both the *Taylor*[85] and *Dowell*[86] courts rejected the claim that school boards may not consider race in alleviating a segregated school system.

In conclusion it must be remembered that the state is acting by operating a public school system and requiring attendance. In such operation it is subject to the requirements of equal protection and due process and cannot effectively maintain segregation merely because private arrangements have resulted in segregated neighborhoods.

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82. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion).

83. This argument was specifically rejected in Springfield School Comm'n v. Barksdale, 348 F.2d 261, 266 (1965).

84. In Sweatt v. Painter, *supra* note 42, the Court emphasized that most of the lawyers and judges in the state were white, justifying the Negro's need for contact with white lawyers. The Court thus recognized differences in needs as a result of discrimination. In Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962), the court considered a requirement of the University of Mississippi that each candidate for admission furnish certificates from alumni that he was of good moral character. The court recognized differences in need in holding that the requirement denied equal protection to Negro students, as they would find great difficulty in obtaining such certificates due to their race.

85. *Supra* note 25, at 50-51.

86. *Supra* note 7, at 981.